Supreme Court, U.S.
FILED
SEP 6
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-7024

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WARREN MCCLESKEY,

Petitioner,

vs.

WALTER D. ZANT, Superintendent,
Georgia Diagnostic & Classification Center,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, California 95812
Telephone: (916) 446-0345

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

QUESTIONS PRESENTED

1. Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?

2. If not, under what other circumstances will the raising of a new claim in a second or subsequent petition constitute an abuse of the writ?

TABLE OF CONTENTS

Interest of amicus curiae 1

Summary of facts and case 2

Summary of argument 3

Argument 3

I

The common law writ has little relevance to the proceeding in this case 3

II

The standards established under *Wainwright* v. *Sykes* and its progeny should govern abuse of the writ as well as procedural default 8

A. Successive petitions before 1963 8

B. The modern law of procedural default 14

1. *Fay* v. *Noia* and *Sanders* v. *United States* . . .14

2. The cause and prejudice test 15

3. Defaults after trial 18

4. Successive federal petitions 19

C. Statutory language and history 21

D. Conclusion 25

III

Petitioner did not have adequate case to omit his *Henry* claim from the first petition 27

Conclusion 30

TABLE OF AUTHORITIES

Cases

Amadeo v. Zant, 486 U. S. 214, 100 L. Ed. 2d 249,
108 S. Ct. 1771 (1988) 21, 28

Barefoot v. Estelle, 463 U. S. 880, 77 L. Ed. 2d 1090,
103 S. Ct. 3383 (1983) 12, 20

Blanchard v. Bergeron, 103 L.Ed.2d 67,
109 S.Ct. 939 (1989) 22

Bowsher v. Merck & Co., Inc., 460 U. S. 824, 75 L. Ed. 2d 580,
103 S. Ct. 1587 (1983) 21

Brown v. Allen, 344 U. S. 443, 97 L.Ed. 469,
73 S. Ct. 397 (1953) 7

Bushell's Case, 124 Eng. Rep. 1006 (1670) 4, 5

Butler v. McKellar, 110 S. Ct. 1212,
108 L. Ed. 2d 347 (1990) 7

Cross v. Burke, 146 U. S. 82, 36 L. Ed. 896,
13 S. Ct. 22 (1892) 12

Davis v. United States, 411 U. S. 233, 36 L. Ed. 2d 216,
93 S. Ct. 1577 (1973) 15

Estelle v. Williams, 425 U. S. 501, 48 L. Ed. 2d 126,
96 S.Ct. 1691 (1976) 23

Ex parte Cuddy, 131 U. S. 280, 33 L.Ed. 154,
9 S. Ct. 703 (1889) 9, 10

Ex parte Cuddy, 40 F. 62 (1889) 8, 9, 10, 26, 29

Ex parte Lange, 18 Wall. (85 U. S.) 163,
21 L. Ed. 872 (1874) 6

Ex parte Savin, 131 U. S. 267, 33 L.Ed. 150,
9 S. Ct. 699 (1889) 8

Ex parte Siebold, 100 U. S. 371, 25 L.Ed. 717 (1880) 6

Ex parte Watkins, 3 Pet. (28 U. S.) 193, 7 L. Ed. 650 (1830) 5, 6

Ex parte Wilson, 114 U. S. 417, 29 L.Ed. 89,
5 S. Ct. 935 (1885) 6

Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837,
83 S. Ct. 822 (1963) 14

Francis v. Henderson, 425 U. S. 536, 48 L. Ed. 2d 149,
96 S. Ct. 1708 (1976) 15, 16, 17

Frank v. Mangum, 237 U. S. 309, 59 L.Ed. 969,
35 S. Ct. 582 (1915) 7

Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346,
92 S. Ct. 2726 (1972) 6

Harris v. Reed, 103 L. Ed. 2d 308,
109 S.Ct. 1038 (1989) 17, 29

Herb v. Pitcairn, 324 U. S. 117, 89 L.Ed. 789,
65 S. Ct. 459 (1945) 17

In re Belt, 159 U. S. 95, 40 L.Ed. 88, 15 S. Ct. 987 (1895) . . . 6

Johnson v. Zerbst, 304 U. S. 458, 82 L.Ed. 1461,
58 S. Ct. 1019 (1938) 24

Mackey v. United States, 401 U. S. 667, 28 L. Ed. 2d 404,
91 S. Ct. 1160 (1971) 19

Matter of Moran, 203 U. S. 96, 51 L.Ed. 105,
27 S. Ct. 25 (1906) 6

McCleskey v. Kemp, 481 U. S. 279, 95 L. Ed. 2d 262,
107 S. Ct. 1756 (1987) 27

Moore v. Dempsey, 261 U. S. 86, 67 L.Ed. 543,
43 S. Ct. 265 (1923) 7

Murray v. Carrier, 477 U. S. 478, 91 L. Ed. 2d 397,
106 S. Ct. 2639 (1986) 18, 21, 26, 27, 28

People v. Anderson, 6 Cal.3d 628, 100 Cal. Rptr. 152,
493 P. 2d 880 (1972) 20

Price v. Johnston, 334 U. S. 266, 92 L.Ed. 1356,
68 S. Ct. 1049 (1948) 11, 12, 13, 22, 26, 29

Reed v. Ross, 468 U. S. 1, 82 L. Ed. 2d. 1,
104 S. Ct. 2901 (1984) 18, 19

Rose v. Lundy, 455 U.S. 509, 71 L. Ed. 2d 379,
102 S. Ct. 1198 (1982) 27

Salinger v. Loisel, 265 U. S. 224, 68 L.Ed. 989,
44 S. Ct. 519 (1924) 11

Sanders v. United States, 373 U. S. 1, 10 L. Ed. 2d 148,
83 S. Ct. 1068 (1963) 10, 14, 22

Sawyer v. Smith, 111 L. Ed. 2d 193, 110 S. Ct. 2822 (1990) . .21

Schneckloth v. Bustamonte, 412 U. S. 218, 36 L. Ed. 2d 854,
93 S. Ct. 2041 (1973) 6, 25

Stone v. Powell, 428 U. S. 465, 49 L. Ed. 2d 1067, 96 S. Ct.
3037 (1976) 25

Townsend v. Sain, 372 U. S. 293, 9 L. Ed. 2d 770,
83 S. Ct. 745 (1963) 14

United States ex rel. McCann v. Adams, 320 U. S. 220,
88 L.Ed. 4, 64 S. Ct. 14 (1942) 12

United States v. Frady, 456 U. S. 152, 71 L. Ed. 2d 816,
102 S. Ct. 1584 (1982) 17, 18

United States v. Henry, 447 U. S. 264, 65 L. Ed. 2d 115,
100 S. Ct. 2183 (1980) 27

Wainwright v. Sykes, 433 U. S. 72, 53 L. Ed. 2d 594,
97 S. Ct. 2497 (1977) 3, 13, 16, 26

Waley v. Johnston, 316 U. S. 101, 86 L.Ed. 1302,
62 S. Ct. 964 (1942) 12

Wong Doo v. United States, 265 U. S. 239, 68 L.Ed. 999,
44 S. Ct. 524 (1924) 11, 12

Constitution

U. S. Const. amend VI 5

U. S. Const. art. I, § 9 5

Statutes and Rules

Federal Rules of Criminal Procedure Rule 12 (b) 15

Rule 52(b) 17

Habeas Corpus Act, 31 Car. II c. 2 (1679) 4

Judiciary Act § 14, 1 Stat. 81 (1789) 5

Rules Governing Section 2254 Cases in the United States
District Courts, Rule 9(b) 23, 25

28 U. S. C. § 2244(b) 21, 25

28 U. S. C. § 2255 14

Treatises

Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963) 4, 6, 7

Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 . . . . . 7, 22, 29

3 W. Blackstone, *Commentaries* 131 (1768) 4, 5

Miscellaneous

Habeas Corpus: Hearings on H. R. 15319 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 15 (1976) 23, 24

H. R. Rep. No. 308, 80th Cong., 1st Sess. (1947) 22

H. R. Rep. No. 1892, 89th Cong., 2d Sess. (1966) 22

H. R. Rep. No. 94-1471, reprinted in 1976 U. S. Code Cong. & Admin. News 2478 25

S. Rep. No. 1797, 89th Cong., 2d Sess. (1966) 22, 23

W. Shakespeare, *Julius Caesar*, act III, scene ii (1598) 28

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WARREN MCCLESKEY,

Petitioner,

vs.

WALTER D. ZANT, Superintendent,
Georgia Diagnostic & Classification Center,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

---

1. CJLF has written consent of the parties to file this brief.

The present case involves the extended relitigation of the legality of a proceeding conducted many years ago, involving no substantial question of whether respondent is actually guilty. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On May 13, 1978, defendant/petitioner Warren McCleskey and three accomplices robbed a furniture store, tied up the employees, and forced the manager at gunpoint to turn over the store receipts. Officer Frank Schlatt responded to a silent alarm. One of the robbers shot and killed him with a Rossi .38 caliber revolver. *McClesky* v. *State*, 263 S. E. 2d 146, 147-148 (1980).

This robbery was not McCleskey's first. He had previously committed at least two other robberies, in one of which he obtained a Rossi .38. *Id*., at 150.

A part of the evidence identifying McCleskey as the triggerman was the testimony of a jailhouse informant, Offie Gene Evans. *Ibid*. McCleskey was convicted and sentenced to death, and the Georgia Supreme Court unanimously affirmed. *Id*., at 152. The United States Supreme Court denied certiorari. *McClesky* v. *Georgia*, 449 U. S. 891 (1980). State habeas corpus was denied, and the Supreme Court again denied certiorari. *McCleskey* v. *Zant*, 454 U. S. 1093 (1981).

In December 1981, McCleskey filed a federal habeas petition asserting 18 grounds for relief. *McCleskey* v. *Zant*, 580 F. Supp. 338 (1984). Over two years later, in an exhaustive opinion occupying 66 pages of the Federal Supplement, the district court granted relief on one claim and denied relief on all the others. *Id*., at 345. The Eleventh Circuit en banc reversed the grant and affirmed all the denials. *McCleskey* v. *Kemp*, 753 F. 2d 877 (1985). The Supreme Court granted certiorari limited to the racial discrimination claim and affirmed. *McCleskey* v. *Kemp*, 481 U. S. 279 (1987).

After denial of a second state habeas petition, McCleskey filed the present federal petition. The petition included a claim, not made in the first federal petition, that Evans was a police informant and that his conversations with McCleskey in jail violated the rule in *Massiah* v. *United States*, 377 U.S. 1199 (1964). The district court granted relief on this claim and denied relief on all others in an unpublished opinion. J. A. 63-100. The Eleventh Circuit reversed, finding an abuse of the writ. *McCleskey* v. *Zant*, 890 F.2d 342, 353 (1989).

SUMMARY OF ARGUMENT

The reasons for the common law's tolerance of successive habeas petitions was closely linked to the strictly limited purpose of the common law writ. Today's writ of collateral attack is a different procedure with a different purpose, and different considerations therefore govern the permissibility of successive writs.

The considerations underlying the rule of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), regarding state procedural bars, apply with equal force to the petitioner's failure to raise an issue on the first federal petition. The cause and prejudice test with the miscarriage of justice exception should be adopted. The Eleventh Circuit's ruling in the present case effectively found no cause, no prejudice, and no miscarriage of justice and should be affirmed.

ARGUMENT

I. The common law writ has little relevance to the proceeding in this case.

Petitioner relies heavily on the common law rule that a prisoner seeking habeas relief could go from court to court without limit. Pet. Brief 26-30. This argument contains one glaring flaw. The common law writ was totally unavailable for the relief which petitioner seeks in this case: collateral attack on a felony conviction by a court of general jurisdiction. If the

common law controls this case, the petition should be summarily dismissed. If not, we need to inquire whether the rationale underlying the old rule has any application to the modern mutant writ.

The common law writ was only available as a remedy for "illegal confinement." See 3 W. Blackstone, *Commentaries* 131 (1768). In most cases, the illegal confinement consisted of imprisonment by an executive officer without judicial action. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 475 (1963).[2] Executive detentions were the target of the famous Habeas Corpus Act, 31 Car. II c. 2 (1679). See Blackstone, *supra*, at 135. That act expressly excepted persons committed "for Treason or Fellony plainely expressed in the Warrant of Committment" and "persons Convict or in Execution by legall Processe." 31 Car. II c. 2 § II. The statute's mandate to discharge the prisoner did not apply if "the Party soe committed is detained upon a legall Processe Order or Warrant out of some Court that hath Jurisdiction of Criminall Matters . . . for such Matters or Offences for the which by the Law the Prisoner is not Baileable." *Ibid.* Pretrial felony detainees could invoke the act only as a remedy for a violation of the right to speedy trial. *Id.*, § VI.

The only significant use of habeas corpus as a collateral attack arose in the famous and often miscited *Bushell's Case*, 124 Eng. Rep. 1006 (1670). In that case, jurors who had been held in contempt for bringing in the "wrong" verdict in a political prosecution were held to be entitled to habeas relief, even though the contempt order was issued by a court with jurisdiction of the person and the subject matter. The *Bushell* court went out of its way, however, to distinguish a contempt case from criminal cases. "A man committed for treason or felony, and bringing a habeas corpus, hath retorn'ed upon it, that he was committed for high treason or felony; *and this is a sufficient retorn to remand him* . . . ." *Id.*, at 1009 (emphasis

2. Cited below as "Bator."

added). The distinguishing factor was that the accused criminal had adequate remedies in the usual course of procedure, while the alleged contemnor did not. *Id.*, at 1010.

The distinction so carefully marked out by *Bushell* remained well established through the colonial period. Immediately after his oft-quoted praise of the "great and efficacious writ," Blackstone notes that writs would often be denied as meritless on their face. If the writ "issued of mere course . . . a traitor or felon under sentence of death . . . might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the court." 3 Blackstone, *supra*, at 132. Such an abuse would be intolerable, "[a]nd therefore Sir Edward Coke, when chief justice, did not scruple in 13 Jac. I. to deny a *habeas corpus* to one confined by the court of admiralty for piracy; *there appearing, upon his own shewing, sufficient grounds to confine him.*" *Ibid.* (emphasis added).

One imprisoned as a punishment for crime by a court of clear jurisdiction could indeed petition every judge in the country, but he would receive the same immediate answer from every judge. The writ would not even be considered. It was simply not available for the purpose of reviewing such a judgment.

The writ was brought to America and guaranteed in our Constitution. U. S. Const. art. I, § 9. The first Congress expressly granted the federal courts power to issue the writ. Judiciary Act § 14, 1 Stat. 81 (1789). The common law limitation remained, however. "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830).

"Abuse of the writ," in the sense that the phrase is used today, was thus controlled by the limited nature of the writ. Questions of the legality of imprisonment before trial or without trial could arise only as long as that imprisonment lasted. The accused was entitled to a speedy trial, U. S. Const.

amend. VI, and a legal pre-trial confinement would normally not last long enough to be the subject of numerous petitions.

Even though lengthy imprisonment replaced death as the penalty for the most felonies in the first half of the nineteenth century, see *Furman* v. *Georgia*, 408 U.S. 238, 338 (1972) (opn. of Marshall, J.), the problem of abuse still did not arise, because of the rule stated in *Watkins*. Courts with jurisdiction to try felonies were courts of general jurisdiction. "The judgment of the circuit court, in a criminal case, is, of itself, evidence of its own legality .... The law trusts that court with the whole subject, and has not confided to this court the power of reviewing its decisions." *Watkins*, *supra*, 3 Pet., at 207.

The limitation recognized in *Watkins* remained unchanged and was generally understood to be in force in 1867. In that year, Congress extended the federal writ to state prisoners detained in violation of federal law, but gave no indication that it intended to change the *Watkins* rule. Bator, *supra* n. 2, 76 Harv. L. Rev., at 474-77; *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 253 (1973) (Powell, J., concurring).

The development of habeas corpus as a device to relitigate convictions of crime already decided by courts of competent jurisdiction was entirely a judicial invention after the 1867 act. It began with the idea that the imposition of both fine and imprisonment, under a statute authorizing only one or the other, was beyond the "jurisdiction" of the Court. *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1874). It was further expanded with the holding that a federal court has no jurisdiction to try an "infamous" crime without an indictment. *Ex parte Wilson*, 114 U. S. 417, 429 (1885). The outer limit of nineteenth century collateral attack was reached in *Ex parte Siebold*, 100 U. S. 371 (1880). On the theory that an unconstitutional statute is absolutely void, it was held that the constitutionality of the statute creating the offense could be reconsidered on habeas. *Id.*, at 376-377. The rule was still in force, though, that errors of procedure could not be collaterally attacked, even if they rose to constitutional stature. *In re Belt*, 159 U. S. 95 (1895) (validity of jury waiver statute); *Matter of Moran*, 203 U. S. 96, 105 (1906) (allegedly

forced self-incrimination not "jurisdictional").

Inquiry into procedural error was made available in the twentieth century to meet an overriding need. Black defendants were being wrongfully convicted due to infection of the system by racial prejudice, and direct review by this Court was insufficient to correct the injustices. See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 154-155 (1970);[3] Bator, *supra* n. 2, 76 Harv. L. Rev., at 523. In *Moore* v. *Dempsey*, 261 U. S. 86 (1923), for example, the petitioners had been convicted in a mob-dominated trial, and the state corrective process had made no serious inquiry into the due process issue. *Id.*, at 87-90; cf. *Frank* v. *Mangum*, 237 U. S. 309, 333-336 (1915) (state court carefully considered question and decided trial was not mob-dominated). Finally, in *Brown* v. *Allen*, 344 U. S. 443 (1953), the Court addressed the merits of Black petitioners' jury discrimination claims, with only one Justice contending that the state court's resolution of the issue be accepted as final. *Id.*, at 545 (Jackson, J., concurring). Unlimited review has been the norm from *Brown* until very recently. See *Butler* v. *McKellar*, 110 S. Ct. 1212, 1224-1225, 108 L. Ed. 2d 347, 365-366 (1990) (Brennan, J., dissenting).

The present habeas corpus proceeding is petitioner's fourth. It is the fifth review of his judgment of conviction.[4] The common law which he seeks to invoke would not have considered even his first petition, much less his fourth. Petitioner seeks to have his cake and eat it too, invoking the common law tradition of the Great Writ when it suits his purpose, while at the same time using the writ for a purpose strictly forbidden by that same tradition.

---

3. Cited below as "Friendly."

4. His case has previously been reviewed on direct appeal, two state habeas petitions, and one federal petition.

The common law therefore does not provide the answer. To determine what limits on successive applications are proper, it is necessary to reexamine the successive writ cases in the context of the massive change in the function of the writ which was occurring at the same time.

II. The standards established under *Wainwright* v. *Sykes* and its progeny should govern abuse of the writ as well as procedural default.

A. Successive Petitions Before 1963.

The first substantial post-Reconstruction discussion on repetitive applications is in *Ex parte Cuddy*, 40 F. 62 (1889). Cuddy was held in contempt for attempting to improperly influence a juror. According to his second petition, the transaction took place a quarter mile from the courthouse. *Id.*, at 63. Cuddy contended that his actions were not in the presence of the court, and therefore the court had no contempt jurisdiction. The relevant statute provided "that such power to punish contempts shall not be construed to extend to any case except the misbehavior of any person in their [the courts'] presence, or so near thereto as to obstruct the administration of justice . . . ." *Ibid.*, quoting from Rev. Stat. § 725.

The Supreme Court decided Cuddy's first petition on the same day it decided a similar case, *Ex parte Savin*, 131 U. S. 267 (1889).[5] Savin had attempted to bribe a witness in the jury room and again in the hallway. *Id.*, at 269. The *Savin* Court decided that "presence" was not limited to the personal presence of the judge but instead extended throughout the courthouse. *Id.*, at 277.

---

5. Both cases were argued April 25, 1889, and decided May 13, 1889. See 131 U. S. 267, 280.

Cuddy's first petition was limited to conclusory allegations of lack of jurisdiction supported only by the records of the contempt proceeding. *Ex parte Cuddy*, 131 U. S. 280, 281-283 (1889). From the contempt order it may be fairly inferred that Cuddy's actions did not occur in the personal presence of the judge, see *id.*, at 281-282, but neither the petition nor the record indicate whether Cuddy approached the juror in the courthouse or elsewhere. *Id.*, at 284. Looking only at their wording of the statute, there was no reason to expect that the specific location would be important. Cuddy knew the facts but had no reason to realize their legal significance until the issue arose in *Savin*. The Supreme Court affirmed denial of relief. *Id.*, at 287.

The second application was made to Justice Field as circuit justice. After discussing other possible grounds for decision, Justice Field based his denial squarely on the ground of the prior petition.

> "If [petitioner] can renew [his application] on another record, which may also be in some other particular defective, and so on indefinitely whenever he fails on appeal, it is plain that the writ may often become an instrument of oppression, instead of a means of relieving one from an unjust and illegal imprisonment. The writ of *habeas corpus*, it is true, is the writ of freedom, and is so highly esteemed that by the common law of England applications can be made for its issue by one illegally restrained of his liberty to every justice of the kingdom having the right to grant such writs.
>
> * * *
>
> "In many instances great abuses have attended this privilege, which have led in some of the states to legislation on the subject. And, in the absence of such legislation, while the doctrine of *res judicata* does not apply, it is held that the officers before whom the second application is made may take into consideration of the fact that a previous application had been made to another officer and refused; and *in some instances that fact may justify a refusal of the second.*

* * *

"In what I have said I refer, of course, to cases where a second application is made upon the same facts presented, *or which might have been presented*, on the first. The question is entirely different when *subsequent occurring events* have changed the situation of the petitioner so as in fact to present a new case for consideration. In the present application there are *no new facts which did not exist* when the first was presented. And under the law of the United States an appeal is allowed to the supreme court where the writ is refused,—*a provision which would seem to have been adopted to prevent a second application upon the same facts which were or might have been presented in the first instance*. I am of the opinion that in such a case a second application should not be heard, except where the judgment of affirmance by the supreme court is rendered without prejudice to, or with leave to make a new application by, the petitioner." *Id.*, at 65-66 (emphasis added).

Cuddy thus holds that as a general rule the first petition must present all facts in support of the petition which can be presented. There must be some good reason why the facts were not presented the first time to avoid a dismissal of the second petition. Significantly, there is no hint of a requirement that the petitioner's conduct has been inequitable in the sense that he is coming to the court with unclean hands. Cf. *Sanders* v. *United States*, 373 U. S. 1, 17-18 (1963). The lack of a good reason for not presenting the evidence on the first petition is sufficient to deny the writ.

Nonexistence of the supporting facts at the time of the first petition is obviously a good enough reason. The failure of the petitioner to recognize their legal significance was not good enough in *Cuddy*, however, despite the fact that the legal significance arose upon a subsequent and rather strained construction of the statute by the Supreme Court. Cuddy appears to have been represented by counsel throughout the proceedings, see 131 U. S., at 281, and that fact may have had

a bearing on the decision. Cf. *Price* v. *Johnston*, 334 U. S. 266, 291 (1948) (*pro se* petitioner).

In *Salinger* v. *Loisel*, 265 U. S. 224 (1924), the Supreme Court held that a prior habeas petition was not res judicata but that the common law rule of "independent judgment on each successive application" was no longer in effect. *Id.*, at 230-231. The mandate of Congress "to dispose of the party as law and justice may require" meant that the availability of appellate review and denial of prior habeas relief could "be considered, and even given controlling weight." *Id.*, at 231. *Salinger* quoted *Cuddy*, *supra*, with approval. *Id.*, at 231-232. Thus, the denial of a prior petition occupies some vaguely defined middle ground. It is less than res judicata, but a prior denial carries much more than the zero weight which it carried at common law.

Wong Doo v. *United States*, 265 U. S. 239 (1924) was decided the same day as *Salinger*. Wong Doo's first petition presented two grounds, but he put on no proof of the second. He then relied on the second ground for his second petition. *Id.*, at 239-240. The Supreme Court held that the lower court erred in invoking the rigid bar of res judicata but that the case was so clearly an abuse of the writ that no remand was necessary. *Id.*, at 241. The Court believed that the evidence "was accessible all the time," *ibid.*, and Wong Doo was apparently represented by counsel. The Court notes that under these circumstances good faith required presentation of the proof on the first petition and that reserving the proof for a later petition was in bad faith and abusive. It does not follow, however, that this kind of bad faith is the only form of abuse of the writ or the only circumstance in which denial of the prior petition is sufficient to deny the present one. The much broader language of *Cuddy* and *Salinger* is in no way

rejected in *Wong Doo*.[6]

The next major statement on abuse of the writ came in *Price* v. *Johnston*, 334 U. S. 266 (1948).[7] The main issue in *Price* was which party had the burden of pleading abuse or nonabuse of the writ in a successive petition. Four Justices thought that the petitioner should state the reasons in his petition. *Id.*, at 294 (Frankfurter, J., dissenting); *id.*, at 297 (Jackson, J., dissenting). The majority placed the burden of pleading abuse on the government, with reasoning based squarely on the *pro se* status of petitioners "often unlearned in the law." *Id.*, at 291-292.

On the merits of the successive petition issue, the Court distinguished *Salinger* and *Wong Doo* as cases where the prior petition had raised the same issue. *Id.*, at 289-290. The majority contradicts itself, however, on the effect of a prior petition raising a different issue. At one point, the majority says "the three prior refusals to discharge petitioner can have *no* bearing or weight on the disposition to be made of the new matter raised in the fourth petition." *Id.*, at 289 (emphasis added).

---

6. Because *Wong Doo* was a deportation case rather than an imprisonment case, it contains a comment which is particularly relevant to capital cases. The Court notes that abusive use of the writ could "postpone the execution of the order indefinitely" and that it "already has been postponed almost four years." *Ibid.*; cf. *Barefoot* v. *Estelle*, 463 U.S. 880, 888 (1983).

7. Two cases decided in the interim are cited by petitioner: *United States ex rel. McCann* v. *Adams*, 320 U. S. 220 (1942) and *Waley* v. *Johnston*, 316 U. S. 101 (1942). Both of these are brief per curiam opinions in cases where the abuse of the writ issue was conceded by the government in this Court. They therefore lack the adversarial process that is essential to the making of sound precedent. See *Cross* v. *Burke*, 146 U. S. 82, 86-87 (1892).

This is an extreme statement. If the prior refusals really had *no* bearing, there would be no abuse issue and the case would have been remanded for an immediate hearing on the merits. Instead, the Court explicitly directed that the abuse of the writ issue be considered on remand. *Id.*, at 294. Another passage of the opinion is much more consistent with the actual disposition of the case:

> "If called upon, the petitioner may be able to present *adequate reasons* for not making the allegation earlier, reasons which make it *fair and just* for the trial court to overlook the delay. *The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned.* And if for some *justifiable reason* he was previously unable to assert his rights or unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny all opportunity of obtaining judicial relief." *Id.*, at 291 (emphasis added).[8]

This holding is entirely different from the earlier statement and is entirely in keeping with the spirit of *Cuddy*, *Salinger*, and *Wong Doo*. The denial of a prior petition is *not* without effect. Its effect is to place upon the petitioner, once the issue has been raised, the burden of showing reasons for not making the allegation earlier. The petitioner's showing must clear two hurdles. First, the reasons shown must be adequate, and second, the circumstances must be such that it is fair and just that the second or subsequent petition be considered. In other words, he must show cause and prejudice. Cf. *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977).

---

8. This discussion is in the portion of the opinion dealing with facts known to the petitioner. The Court does not discuss in any depth the circumstances under which newly discovered facts will justify a second petition.

B. The Modern Law of Procedural Default.

1. Fay v. Noia and Sanders v. United States.

The modern law of procedural default on habeas begins with a pair of cases decided several weeks apart: *Fay* v. *Noia*, 372 U. S. 391 (1963) and *Sanders* v. *United States*, 373 U. S. 1 (1963). *Noia* involved a claim of involuntary confession which was barred on state collateral review due to Noia's failure to appeal. After an extensive review of the history of habeas corpus, the Court concluded that "the jurisdiction of federal courts on habeas corpus is not affected by procedural defaults . . . during the state court proceedings," with the caveat that "the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts." *Id.*, at 438.

Sanders involved a federal prisoner who had filed a second motion under 28 U. S. C. § 2255. The first petition had stated bare conclusions unsupported by facts and was dismissed. The case was arguably different from *Noia* in that it involved a federal prisoner, rather than state, and the default in question was failure to raise the point on the first collateral attack, rather than failure to object at trial or on direct appeal. See *Sanders*, 373 U. S., at 5-6.

The *Sanders* Court identified two different "abuse of the writ" problems. One situation, the one involved in the case, involves an attempt to relitigate an issue contained in the previous petition, though perhaps not resolved on the merits. 373 U. S., at 15-17. The second situation involves the new claim, and the *Sanders* Court's ruminations on this point are pure dicta. The Court decided not to "deal at length" with this issue and simply stated that *Fay* v. *Noia* and a companion case, *Townsend* v. *Sain*, 372 U. S. 293 (1963), "deal at length with the circumstances under which a prisoner may be foreclosed from federal collateral relief. The principles developed in those decisions govern equally here." *Sanders*, 373 U. S., at 18.

Thus the *Sanders* Court itself disclaimed any difference between presenting a new ground not raised in a previous federal petition and presenting a ground procedurally defaulted in the state system. Both situations balance the same opposing interests, finality versus opportunity to have the claim heard, and both are to be governed by the same standard.

Subsequent development in the law of state procedural defaults has caused the *Sanders* dictum to become ambiguous. *Sanders* can be read to say that "deliberate bypass" is the standard, or it can be read to say that the standard is the same as for state procedural defaults. The two are no longer the same.

2. The Cause and Prejudice Test.

Ten years after *Noia* and *Sanders*, the "deliberate bypass" standard set in those cases began to decline. In *Davis* v. *United States*, 411 U. S. 233 (1973), a § 2255 petitioner challenged as racially discriminatory the composition of the grand jury which had indicted him. Davis had not challenged the grand jury by pretrial motion, as required by Federal Rule of Criminal Procedure 12(b)(2). The Court held that the rule was an express waiver provision enacted by Congress and therefore could not be defeated by permitting the waived claim to be raised on collateral attack. 411 U. S., at 242.

Davis emphasized the importance of raising the objection before trial in order to allow the trial judge to make the correction, if necessary. If the defendant makes a timely challenge, "inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial." 411 U. S., at 241.

In *Francis* v. *Henderson*, 425 U. S. 536 (1976), the Court was presented with a state prisoner seeking habeas in circumstances otherwise identical to *Davis*. The practical interests involved were the same. Prompt raising of the objection would have allowed prompt correction. The

governmental interests, though, were quite different. The state procedural rule, unlike the federal rules, did not emanate from the same authority that had enacted the habeas statutes. On the other hand, a federal writ of habeas corpus for a state prisoner involves considerations of federal/state comity not involved in a § 2255 proceeding. Notwithstanding these differences, *Francis* adopted the *Davis* cause and prejudice test. *Id.*, at 542. Although the *Francis* majority did not explicitly overrule *Fay* v. *Noia*, despite a challenge from the dissent to state its position explicitly, *id.*, at 546-47 (Brennan, J., dissenting), the result is clearly inconsistent with *Noia*'s "deliberate bypass" standard.

The cause and prejudice test was extended beyond grand jury challenges in *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). Petitioner had not objected at trial to the admission of a statement taken without *Miranda* warnings and had not raised the issue on appeal. Florida rules required the suppression motion to be made before trial in most cases. *Id.*, at 76, n. 5. *Sykes* followed *Francis* and applied the cause and prejudice test to failure to object to a confession at trial. Unlike *Francis*, the *Sykes* Court made its rejection of "the sweeping language of *Fay* v. *Noia*" explicit. *Id.*, at 87-88.

The *Sykes* Court repeated the same practical considerations stated in *Francis* and *Davis*. A contemporaneous objection at trial is needed to identify, determine, and if necessary, correct the problem and then proceed with the trial. *Id.*, at 88-89. The *Sykes* Court was also concerned with the possibility of "sandbagging." An objection might be withheld for the purpose of getting two bites at the apple. A defendant might be acquitted, or receive a light sentence, at the first trial. If not, and if reversible error is introduced and the conviction vacated years later, defendant will get a second trial on stale evidence. *Id.*, at 89. A contemporaneous objection rule thus requires the defense to concentrate its energies on insuring that the first trial is free of error, not the opposite. *Id.*, at 90.

In addition to the above considerations, the *Sykes* Court discussed the idea that a procedural default is an independent state ground for the decision. A state may constitutionally

require that an objection be raised at a certain point or waived, the argument goes, and thus the affirmance of the conviction rests on the adequate state ground of waiver, not the federal ground of the lack of merit of the objection itself. *Id.*, at 81-82. If independent state grounds were really the basis of *Sykes*, though, the cause and prejudice test would not apply. The lack of a federal question is jurisdictional, not discretionary. See *Herb* v. *Pitcairn*, 324 U. S. 117, 125-126 (1945). If the state ground were, by itself, sufficient to support the judgment, federal courts would have no power to interfere, cause or no cause, prejudice or no prejudice. See *Harris* v. *Reed*, 109 S. Ct. 1038, 1052-1053, 103 L. Ed. 2d 308, 328-329 (1989) (Kennedy, J., dissenting).[9] Because *Francis* and *Sykes* lay down a rule governing the judicious use of power rather than the limitations of power, see *Francis*, 425 U. S., at 538-39, the ground cannot be a jurisdictional one.

The cause and prejudice test was extended to a case involving neither federalism nor Rule 12(b) in *United States* v. *Frady*, 456 U. S. 152 (1982). Frady had been convicted of murder in the United States District Court for the District of Columbia. Frady brought a § 2255 motion, claiming for the first time that the jury instructions had incorrectly defined "malice," *id.*, at 157-58, n. 6, citing two cases decided four and seven years, respectively, after his trial, *ibid.*

The Court of Appeals held that the error had to be considered on a § 2255 motion if it met the "plain error" standard of Federal Rule of Criminal Procedure 52(b), the standard applied on appeal for most errors not objected to at trial. This Court reversed.

The *Davis* holding that rules on habeas could be no more lenient than those on appeal did not imply that they could be

---

9. The *Harris* majority relies on the independent state grounds "lineage" of *Sykes* for its "plain statement" rule, *id.*, at 1042, L. Ed. 2d, at 315, but in the end the majority returns to an interest and burden analysis. *Id.*, at 1044, L. Ed. 2d, at 318.

no more stringent. 456 U. S., at 164. While the *Davis* Court had decided that the rules for preserving an objection for appeal established a floor for considering the issue on habeas, the *Frady* Court rejected the contention that the appellate rules could establish a ceiling. Respect for finality of judgments permits the judicial creation of a standard for habeas higher than the one created for appeal by the rules. The cause and prejudice standard of *Davis, Francis,* and *Sykes* was held to be the proper balance between society's interest in finality and the petitioner's interest in belatedly asserting his claim. 456 U. S., at 166-67.

3. Defaults After Trial.

All of the cases from *Davis* to *Frady* had involved failure to object at trial. The primary open question remaining was whether the cause and prejudice standard also applied in the event of failure to raise an issue on appeal. This issue was addressed in *Reed* v. *Ross*, 468 U. S. 1 (1984). Ross had failed to object to a burden-shifting jury instruction at trial, but the state had no contemporaneous objection rule at the time. *Id.*, at 7, n. 4. He also failed to raise the issue on appeal. The Court saw no reason to apply a different standard on that basis.

> "This type of rule [requiring legal issues to be raised on appeal or waived] promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case. To the extent that federal courts exercise their § 2254 power to review constitutional claims that were not properly raised before the state court, these legitimate state interests may be frustrated: evidence may no longer be available to evaluate the defendant's constitutional claim if it is brought to federal court long after his trial: and it may be too late to retry the defendant effectively if he prevails in his collateral challenge. *Id.*, at 10-11.

If any doubt remained that the same test applied for both trial and appellate defaults, it was eliminated in *Murray* v. *Carrier*, 477 U. S. 478, 490-92 (1986).

4. Successive Federal Petitions.

Looking at the cause and prejudice cases as a group, we see that only one common thread runs through all of them. In each case, the interest of the petitioner in having his claim heard must be balanced against the interest of the state in having the issue raised at the earliest possible stage of the proceedings. While explicit federal and state rules are involved in most of the cases, only one case, *Davis*, actually involves a rule with a "cause" exception and none involve rules with an explicit "prejudice" requirement to invoke the exception. *Frady* does not involve any explicit procedural rule at all. The cause and prejudice standard is not based on a respect for procedural rules as such but on a recognition of the needs underlying these rules, a respect for the finality of judgments, and a belief that there must, at some point, be an end to litigation.

The interests to be balanced were neatly summed up in *Reed* v. *Ross*. "On the one hand, there is Congress' expressed interest in providing a federal forum for the vindication of constitutional rights of state prisoners .... On the other hand, there is the State's interest in the integrity of its rules and proceedings and the finality of its judgments." *Reed*, 468 U. S., at 10. To determine whether the balance results in the same cause and prejudice test in the present case, we must examine both sides of this equation.

In one sense, the state's interest in enforcing procedural defaults grows weaker as the time after trial increases. There is a great deal of difference between avoiding retrial altogether, as objection at trial may do, and merely hastening the retrial, as an objection on appeal or on the first habeas petition may do. In another sense, though, the interest in finality increases with time. Society, the victim or next-of-kin, and arguably even the defendant need to have a final answer at some point. See *Mackey* v. *United States*, 401 U. S. 667, 690-

691 (1971) (Harlan, J., dissenting).[10] With each additional procedure that is permitted, that final day when all can say "it's over" is further postponed. We must, of course, accept direct appeal as a necessary delay and expense to guard against conviction of the innocent. Then there is state collateral attack. Then there is federal habeas. The frustration builds as attack after attack raises anew the possibility that a guilty person may escape justice and as the probability that the defendant is in fact innocent shrinks far below reasonable doubt into the infinitesimal.

Meanwhile the evidence for retrial grows more and more stale. Memories fade; witnesses die or disappear; physical evidence deteriorates or is lost. The ability to conduct a trial which is fair to society and to the victim, as well as to the defendant, decays with time. New trials are ordered on the theory, or at least the hope, that the second trial will determine the truth more reliably than the first. As time marches on that hope becomes a pipe dream.

The state's interest in having claims which were omitted from the first petition barred from consideration on subsequent petitions may be less than its interest in a contemporaneous objection rule in some respects, but it is greater in others. If all claims must be made in the first petition, absent cause and prejudice, most cases will have a definable end — the final disposition of the first federal petition. That is an important interest indeed. It is especially important in capital cases, where the execution of the sentence cannot begin until the end of proceedings is reached. See *Barefoot* v. *Estelle*, 463 U. S. 880, 888 (1983).

On the other side of the coin is the petitioner's interest in a federal forum for his federal claim. This interest is far less compelling on successive petitions. Even if we assume the

10. This is true even in capital cases. The long wait on death row can be a form of psychological torture. See *People* v. *Anderson*, 6 Cal.3d 628, 649, n. 38, 493 P.2d 880 (1972).

deep suspicion of state courts underlying this interest to be valid,[11] it is one thing to say that the petitioner must be allowed entrance to the federal courthouse and quite another to insist that he has a right to take up residence there. The cause and prejudice test merely requires the petitioner to show that he has a very good reason for not raising his claim earlier, see, *e.g.*, *Amadeo* v. *Zant*, 486 U. S. 214 (1988) (evidence of intentional racism in jury selection concealed by the prosecution), and that the claim involves an error which really made a difference. Finally, there is the safety valve recognized in *Murray* v. *Carrier*, *supra*, 477 U. S., at 496, for the "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent."

The balance between finality and the federal forum thus tips at least as far in the government's favor in this case as it did in *Frady*, *Reed*, or *Carrier*, perhaps further. The cause and prejudice standard is the appropriate one to apply.

C. Statutory Language and History.

In the order granting certiorari in this case, the Court requested briefing on this question: "Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes an abuse of the writ?" J. A. 136.

The negative answer is plain on the face of the statute. The applicant must satisfy the court that he "has not on the earlier application deliberately withheld the newly asserted ground *or otherwise abused the writ*." 28 U. S. C. § 2244(b) (emphasis added). If deliberate withholding or abandonment were the only kind of abuse of the writ, the "otherwise" clause would not be there. See *Bowsher* v. *Merck & Co., Inc.*, 460 U. S. 824,

11. But see *Sawyer* v. *Smith*, 110 S. Ct. 2822, 2831, 111 L. Ed. 2d 193, 210 (1990).

833 (1983) (give effect to every word if possible). The petition need not be entertained if it is an abuse of the writ. Deliberate withholding is one kind of abuse, but there are others. Congress has not specified what the others are, but it has unambiguously stated that other forms of abuse exist.

Justice Scalia has explained the dangers of resorting to legislative history. See *Blanchard* v. *Bergeron*, 109 S.Ct. 939, 946-947, 103 L.Ed.2d 67, 78-79 (1989) (concurring in part). Statutes, not committee reports, go through the involved process of approval by both houses and the President. Nevertheless, that view has not yet garnered a majority, and so we must plunge into the murky waters of the legislative history. We find little light there, but what little there is reveals a seascape very different from the one painted by petitioner.

The original section 2244 was intended to make "no change in existing practice" according to a report written before *Price* v. *Johnston*, 334 U. S. 266 (1948). H. R. Rep. 308, 80th Cong., 1st Sess. A 178-179 (1947). When subdivision (b) was added in 1966, on the other hand, it was intended to make a substantial change in the law. "The purpose of these new subsections [(b) and (c)] is to add to section 2244 . . . provisions for a qualified application of res judicata." H. R. Rep. No. 1892, 89th Cong., 2d Sess., 8 (1966); "The bill seeks to alleviate the unnecessary burden [on federal courts] by introducing a greater degree of finality of judgments in habeas corpus proceedings." S. Rep. No. 1797, 89th Cong., 2d Sess. 2 (1966) ("1966 Senate Report").

If nothing else, these statements demonstrate an intent to reject the extreme statements in the case law that finality considerations have no weight in habeas corpus. See *Sanders* v. *United States*, 373 U. S. 1, 8 (1963); *Price* v. *Johnston*, *supra*, 334 U. S., at 289. Congress instead is in accord with Judge Friendly's later retort: The " 'policy against incarcerating or executing an innocent man' . . . shows only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none*." Friendly, *supra* n. 3, 38 U. Chi. L. Rev., at 150 (emphasis in original).

The contention that Congress was simply codifying existing case law is untenable. The reports taken as a whole indicate an intent, indeed a determination, to make an affirmative change in the law in favor of finality.

Regrettably, the reports shed very little light on the precise contours of the intended change. Petitions "predicated on grounds obviously well known to [petitioners] when they filed the preceding application" are listed as *one example* of an abusive writ, 1966 Senate Report, at 2, but there is no exhaustive list. The report explicitly mentions "newly discovered evidence" but once again says that a writ based on such evidence need not be entertained if the prisoner "otherwise abused the writ" with no explanation of what that means. *Ibid.*

The argument has been made that Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts has frozen the *Sanders* "deliberate bypass" test into place and precluded further development of the case law. Such a drastic change in role of the Court in defining the scope of habeas corpus would probably be within the power of Congress, but it should not be inferred without compelling evidence.

Rule 9(b) as originally promulgated by this Court provided for dismissal of successive petitions alleging new grounds if the failure to assert them earlier "is not excusable." See 28 U. S. C. A. § 2254, Rule 9, at 1136 (1977). This language was attacked on two separate grounds. It is important to understand the difference in the two criticisms in order to evaluate the final product.

The National Association of Criminal Defense Lawyers, feared that the proposed language would codify the approach to procedural default in Justice Powell's concurrence in *Estelle* v. *Williams*, 425 U. S. 501, 513-515 (1976). *Habeas Corpus: Hearings on H. R. 15319 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2d

Sess. 15 (1976).[12] The NACDL endorsed instead language proposed by Professor Robert Clinton. He proposed that Congress amend the rule to allow dismissal of the second petition if

> "the judge finds that the failure of the petitioner is the result of the international relinquishment of a right or privilege known to the petitioner either prior to the time when the right or privilege should have been asserted at trial or prior to the filing of the previous petitions . . . . " *Id.*, at 25 (underlining in original).[13]

In other words, Professor Clinton proposed to Congress that it codify *Sanders* in its most liberal interpretation: applying the waiver standard of *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938) to procedural defaults. 1976 Hearings, *supra* n. 12, at 24.

A different objection was voiced by those who believed that the question of the preclusive effect of prior petitions had no place in the rules at all. The ACLU statement, while agreeing with the NACDL, also indicated that the proposed change was in "the domain of substantive rights" and should "be adopted *only* by traditional legislative processes *or enunciated by the Supreme Court* in connection with an actual case or controversy." *Id.*, at 82 (second emphasis added).

Congress was thus presented with three alternatives. First, it could approve (or passively allow) a rule which some claimed would narrow the availability of habeas corpus. Second, it could freeze the case law at its high-water mark of *Fay* v. *Noia* and *Sanders*. Third, it could keep the question out of the rules and leave it to further statutory *and case law* development.

---

12. Cited below as "1976 Hearings."

13. He also proposed that Congress abrogate *Francis* v. *Henderson*, *supra*, and codify *Fay* v. *Noia*, *supra*. *Ibid.*

The language actually adopted by Congress reads "the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." Rules Governing Section 2254 Cases in the United States District Courts, Rule 9(b). Comparing this language with that of the statute ("deliberately withheld the newly asserted ground or otherwise abused the writ," 28 U. S. C. § 2244 (b)) leaves little doubt as to which path Congress chose.

Both the advisory committee language and the Clinton proposal were rejected. The language is neither a new, restrictive standard nor a ringing reaffirmation of the 1963 case law. Instead, it is analytically indistinguishable from the statutory language. The compromise result of the 1976 battle was a rule which changed nothing. Congress has enacted only a repetition of the statute's spacious and elastic phrase "abuse of the writ." Definition of the phrase was a judicial function before enactment of the rules, and it remains a judicial function afterward.

The final committee report on the rule is consistent with this interpretation. The report states that the " 'abuse of the writ' standard brings Rule 9(b) into conformity with existing law." H. R. Rep. No. 94-1471, reprinted in 1976 U. S. Code Cong. & Admin. News 2478, 2482. The authorities cited for "existing law" are section 2244(b) and a very limited quote from *Sanders* stating the "abuse of the writ" rule without elaboration. *Ibid.*

The distinction between freezing case law in place and allowing it to continue unimpeded is an important one. Both the language of the rule and the legislative history indicate that Congress intended not to interfere with judicial definition of "abuse of the writ" when it adopted Rule 9(b).

D. Conclusion.

There is nothing left of *Fay* v. *Noia* today. Its rendition of history has been branded as "revisionist." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 252 (1973) (Powell, J., concurring); see generally *Stone* v. *Powell*, 428 U. S. 465, 474-478 (1976).

Its "sweeping language" has been explicitly rejected. *Wainwright* v. *Sykes*, 433 U. S. 72, 87-88 (1977). Its "deliberate bypass" rule has been erased from the law of state procedural defaults and completely replaced by the cause and prejudice rule. The case is a dead letter.[14]

The *Sanders* dictum has thus hitched the law of abuse of the writ to a broken post. Congress has not seen fit to give any legislative definition whatever to the term. It is therefore incumbent upon the judiciary to define the term in a manner which appropriately balances the competing interests.

The answer, amicus submits, is to return to the principle announced in *Ex parte Cuddy*, 40 F. 62, 66 (1889) that the denial of a prior writ is generally a sufficient reason to deny a second or subsequent writ, absent facts which did not *exist* at the time of the first petition. This rule, however, needs to be tempered with the qualifications expressed in *Price* v. *Johnston*, 334 U. S. 266, 291 (1948), that there may be "adequate reasons" for not making an allegation earlier which make it "fair and just" to consider the subsequent petition, bearing in mind at all times that the purpose of habeas corpus is to prevent an actual miscarriage of justice, *ibid.*

The rules developed for procedural defaults meet all of these criteria. The cause and prejudice test with the miscarriage of justice exception accommodates all of the compelling arguments for considering second and subsequent petitions. Furthermore, by establishing a single standard for all defaulted claims it would bring a sorely needed consistency to a complex area of the law. The test "may lack a perfect historical pedigree," but it "provides a sound and workable means of channeling the discretion of federal courts." *Murray* v. *Carrier*, 477 U.S. 478, 496-497 (1986).

---

14. Courts still cite *Fay* v. *Noia* as if it were still good authority, see, *e.g.*, J. A. 84, apparently because this Court has never used the word "overruled." An explicit acknowledgement that *Fay* v. *Noia* has, in fact, been overruled would help iron out inconsistencies in the case law.

III. Petitioner did not have adequate cause to omit his *Henry* claim from the first petition.

A detailed review of the facts of the case is beyond the scope of an amicus brief, and we will therefore not attempt one here. We will, however, venture a few observations on the application of the cause and prejudice test to the facts of this case.

Petitioner vigorously asserts that Evans' testimony was critical to the prosecution's case. Pet. Brief 55. This assertion leaves one wondering why Evans was not the focus of petitioner's post-conviction strategy from the very beginning, if his testimony were really that critical. Why was so much energy devoted instead to the abstract claim presented to this Court on the first round in *McCleskey* v. *Kemp*, 481 U. S. 279 (1987)? Why did defense counsel seek police records on that claim but not on Evans? See J. A. 61.

Where the testimony of a jailhouse informant is central to the case, a claim under *United States* v. *Henry*, 447 U. S. 264 (1980) is the obvious first place to look. When investigating a *Henry* claim, furthermore, the circumstances of how the informant came to be in the same cell or an adjoining cell would be among the first questions to be asked. There were written logs of cell assignments available at the time of the first petition, J. A. 129, n. 13, but it does not appear that any effort was made to obtain them. Even absent such records, the officer in charge of cell assignments would be the first person to ask. That person, apparently, was Officer Worthy, the officer now claimed to be a newly discovered witness. See J. A. 122.

It would appear that competent defense counsel placed the *Henry* claim on the "back burner" relative to other claims. That fact by itself is a good indication that the testimony in question was not of overwhelming importance. Cf. *Rose* v. *Lundy*, 455 U.S. 509, 543, n. 8 (1982) (Stevens, J., dissenting).

Cause for a procedural default generally requires "some objective factor external to the defense." *Murray* v. *Carrier*,

477 U. S. 478, 488 (1986). Petitioner asserts a "cover-up," Pet. Brief 12, claiming that the state suppressed a written statement by Offie Evans. Pet. Brief 50. State concealment of evidence is indeed "cause," *Amadeo* v. *Zant*, 486 U. S. 214 (1988), and if the present case were actually equivalent to *Amadeo*, that argument would be valid. This case, however, is quite different.

The State of Georgia commendably permitted defense counsel to take the deposition of the assistant district attorney in the state habeas proceeding. During that deposition, the prosecutor said: "Okay. When you referred to a statement, Offie Evans gave his statement but it was not introduced at the trial. It was part of that matter that was made in camera inspection by the judge prior to trial." J. A. 25.

For a statement to be inspected in camera it would have to be in writing or otherwise reduced to tangible form, such as a tape recording. The supposedly suppressed fact was thus stated by the state's attorney directly to the petitioner's attorney four months before the filing of the first federal petition.[15] Cover-ups should be made of sterner stuff. Cf. W. Shakespeare, *Julius Caesar*, act III, scene ii (1598). Defense counsel's assertion that he did not grasp the importance of what was said, J. A. 38, is not sufficient to convert an explicit disclosure into a cover-up. Counsel's failure to detect a claim is not "cause." See *Murray* v. *Carrier*, 477 U. S. 478, 492 (1986).

The absence of Evans' statement from the prosecutor's file does not constitute concealment. The defense had actual notice that the file was not complete. In court, under oath, and in present defense counsel's presence, former defense counsel testified that the prosecutor had told him that two items were missing, one of which was a statement. J. A. 24. The state's representation that it had provided a complete

15. The deposition is dated February 16, 1981. J. A. 25. The first federal petition was filed June 17, 1981. J. A. 64

copy of the prosecutor's file is not a representation that the file contains every relevant document. Petitioner's accusation that the state's "representation was false," Pet. Brief 10, n. 9, is unwarranted.

Petitioners showing falls far short of the kind of cover-up which constituted cause for default in *Amadeo*. At most, petitioner has shown a series of ambiguous statements reflecting confusion about what counsel was asking for. See Pet. Brief 8, n. 6. That confusion was due in large part to counsel's insistence that he was asking for statements *of the defendant*. See, *e.g.*, J. A. 17. A simple, straightforward request for statements *of the witness* would have clarified the situation, but none was made. Petitioner did not have cause to omit the claim from his first petition.

There has also been no fundamental miscarriage of justice in this case. Actual innocence is the touchstone of this narrow exception to the cause requirement. *Harris* v. *Reed*, 109 S. Ct. 1038, 1048, 103 L. Ed. 2d 308, 323 (1989) (O'Connor, J., concurring). To determine whether a genuine claim of actual innocence exists, all evidence should be considered, whether legally obtained or not. See Friendly, *supra* n. 3, at 160. The Court of Appeals found the evidence of guilt clear even without Evans' testimony. J. A. 135. With the Evans testimony and statement in addition, it would seem to be overwhelming.

The facts presented by petitioner in this case are facts which "might have been presented in the first instance." *Ex parte Cuddy*, 40 F. 62, 66 (1889). "[I]n such a case a second application should not be heard . . . ." *Ibid*. "The primary purpose of a habeas corpus proceeding," "to make certain that a man is not unjustly imprisoned," *Price* v. *Johnston*, 334 U.S. 266, 291 (1948), will not be impaired in the least by denial of this murderer's petition.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated: September, 1990

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation